

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL  
COALITION, et al,**

**Plaintiffs,**

**v.**

**Civil Action No. 3:08-cv-00088**

**HOBET MINING, LLC**

**Defendant.**

**HOBET MINING, LLC’S MOTION TO  
STRIKE THE AFFIDAVIT OF DENNIS LEMLY**

Defendant Hobet Mining, LLC (“Hobet”), by counsel, hereby moves this Court for an order striking the testimony of Dr. A. Dennis Lemly contained in certain affidavits. Specifically, Hobet moves to strike the affidavit consisting of the declaration filed by Dr. Lemly in this case at Doc. 41-2. Plaintiffs have withdrawn Dr. Lemly as a testifying expert witness at trial in *OVEC, et al. v. Apogee Coal Company, LLC*, Case No. 3:07-cv-00413, and thus any prior testimony proffered by him constitutes inadmissible hearsay. *See, e.g., Glendale Fed. Bank, FSB v. United States*, 90-772 C, 39 Fed. Cl. 422, 425 (Fed. Cl. 1997) (“Where an expert witness is withdrawn prior to trial . . . the prior [] testimony of that witness may not be used. That [] testimony is hearsay.”); *Minebea Co., Ltd. v. Papst*, CIV.A. 97-0590 (PLF), 2005 WL 6271045 at \*1 (D.D.C. Aug. 2, 2005) (adopting analysis of *Glendale*). Consequently, this affidavit must be stricken.

Respectfully submitted,

HOBET MINING COMPANY, LLC  
By Counsel

/s/Blair M. Gardner

BLAIR M. GARDNER, (WVBN 8807)

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**CERTIFICATE OF SERVICE**

I, Blair M. Gardner, do hereby certify that on July 26, 2010, I electronically filed the foregoing HOBET MINING, LLC'S MOTION TO STRIKE THE AFFIDAVITS OF DENNIS LEMLY with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Derek O. Teaney  
Joseph M. Lovett  
Appalachian Center for the Economy  
and the Environment  
P.O. Box 507  
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James M. Hecker  
Public Justice  
1825 K. Street, NW, Suite 200  
Washington, DC 20006

/s/ Blair M. Gardner